Supreme Court, U.S.
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No. 01-1107

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Page

CASES

In re Steven S., 31 Cal. Rptr. 2d 644 (Cal. App. 1994), *review denied*, 1994 Cal. LEXIS 5185 (Cal. 1994) 1

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) .... *passim*

State v. Ramsey, 430 S.E.2d 511 (S.C. 1993) 4

State v. Sheldon, 629 A.2d 753 (Md. 1993) 4

State v. T.B.D., 656 So.2d 479 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996) 1, 3

State v. Talley, 858 P.2d 217 (Wash. 1993) 1

State v. Vawter, 642 A.2d 349 (N.J. 1994) 4

United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993) 2

United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994) 2

REPLY BRIEF OF PETITIONER

Nothing in respondents' brief in opposition calls into question the need for this Court to review and reverse the decision below. Petitioners and respondents agree that the lower courts are sharply divided on the constitutionality of punishment for cross burning. Moreover, respondents admit that the precedent on which the decision below is based – *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) – is ambiguous. Br. in Opp. at 4-7. Either reason is sufficient to justify review by this Court. Quite simply, this Court should grant *certiorari* to resolve the split and to provide clarification.

1. Respondents candidly acknowledge a split among state courts on the constitutionality of statutes prohibiting cross burning. Br. in Opp. at 10-11. They say that "[d]ecisions in two states, Florida and California, are indeed in irreconcilable conflict with the decision in Virginia." Br. in Opp. at 11. *See State v. T.B.D.*, 656 So.2d 479 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996); *In re Steven S.*, 31 Cal. Rptr. 2d 644 (Cal. App. 1994), *review denied*, 1994 Cal. LEXIS 5185 (Cal. 1994).[1]

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[1] Moreover, as previously shown, the Virginia decision also conflicts with the decision in Washington. *See* Pet. at 15-19, discussing *State v. Talley*, 858 P.2d 217 (Wash. 1993). In that case, the court rejected a constitutional challenge by a defendant who had burned a cross with the intent to intimidate. Respondents try to distinguish *Talley* by noting that the statute there also covered other symbolic acts; however, *Talley* carefully reviewed the challenged statute in light of the three *R.A.V.* exceptions and found no constitutional right to engage in cross burning when the purpose is to intimidate. That is the exact opposite result of the decision below.

2. Respondents also recognize that this state conflict is exacerbated by the decisions of federal appellate courts. Respondents seek to minimize this facet of the conflict by noting that the statutes in the federal cases did not expressly mention cross burning; yet, they concede that there is "tension" between the decision below and some "language and rationales" employed by two circuits. *See United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993). It is a "tension" that cannot be reconciled. Both the Seventh and the Eighth Circuits explicitly stated that cross burning with the intent to intimidate *is not* protected speech under the First Amendment. *See J.H.H.* at 826 (drawing a distinction between cross burning "done with the specific intent to intimidate" and cross burning "done for the sole purpose of making a political statement"); *Hayward* at 1250 ("the act of cross burning also promotes fear, intimidation, and psychological injury. Therein lies the reason cross burning, as done in this case, lacks First Amendment protection").

3. Respondents also agree that the conflict among lower courts is an outgrowth of ambiguity in *R.A.V.* It is a case that can be – and has been – read in two fundamentally different ways. While the labels respondents attach to these alternative readings – "strong" and "weak" – are not the most appropriate nomenclature, respondents are not far from the mark in how they characterize the two competing schools of thought. Some state courts – including the court below – read *R.A.V.* to mean that "no cross burning law will ever survive constitutional attack, precisely and simply because it is a cross burning law." Br. in Opp. at 4. Under this approach, a cross burning ban is

unconstitutional even where – like Virginia – the law bans cross burning by *anyone* who seeks to intimidate *anyone* for *any* reason.

Other courts read *R.A.V.* more narrowly, so as to leave intact those statutes that prohibit *all* cross burning with intent to intimidate, that is to say, statutes that make *no distinctions* among perpetrators, among victims or among reasons for the intimidation. For these courts, if anyone burns a cross simply to express a political viewpoint, he remains protected by the constitution; but, if he burns a cross for the purpose of intimidation, he is liable for punishment under such a content-neutral statute.[2] This view of *R.A.V.* recognizes the reality that cross burning is often performed not to exercise constitutional rights, but to deprive others of *their* rights. *See T.B.D.*, 656 So.2d at 482 ("Few things can chill free expression and association to the bone like . . . a fiery cross in the yard").

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[2] Respondents are correct when they suggest that the Virginia cross burning law was enacted from the motive of "attacking terror". Br. in Opp. at 19. But, they miss the mark when they confuse this objective with a viewpoint-based attack on "racial bigotry." *Id.* The Commonwealth recognizes that racial bigotry, while rightly repudiated by most Virginians and most Americans, is nevertheless a viewpoint and – and such – comes within the protection of the First Amendment. It is the *intimidation* that Virginia seeks to make criminal, not the expression of any viewpoint. Moreover, as an historical matter, the Virginia statute can hardly be described as an act of political correctness. It was originally enacted in 1952, when racial segregation was still a widely held political viewpoint in Virginia, and the objective of the law was not to overcome that viewpoint, but simply to preserve law and order by combating terrorism. *See* App. 89, 100.

Although the Commonwealth believes the latter view is the correct reading of *R.A.V.*, it recognizes that reasonable judges could reach the opposite conclusion, as did a bare majority of Virginia's highest court. Until this Court resolves the ambiguity, the lower courts will continue to reach inconsistent results.

4. Respondents recognize the importance of the issue presented by this case, saying that "the line that separates violent and hateful rhetoric from violent and hateful criminal conduct is central to our constitutional democracy. . . . " Br. in Opp. at 10. Yet, it is a question on which our nation's law is in disarray. In California, Florida, Washington, and in the States covered by the Seventh and Eighth Circuits, those who burn crosses with the intent to intimidate can be subjected to criminal liability. Yet, in Maryland, New Jersey, South Carolina, and, now, Virginia, similar acts of intimidation are regarded as protected speech.[3] This irreconcilable conflict demands immediate review.

5. Moreover, respondents do not – and cannot – deny that this case provides this Court an ideal vehicle to resolve the split among lower courts and to clarify the meaning of *R.A.V.* The case presents two different types of intimidation by cross burning: one occurring on property of the victim (Pet. at 3, Virginia Beach incident), the other occurring with consent of the land owner, but in a place visible to the public (Pet. at 6, Carroll County incident). The case is uncluttered by disputes about the

[3] *See* Pet. at 20-23, discussing *State v. Sheldon*, 629 A.2d 753 (Md. 1993); *State v. Vawter*, 642 A.2d 349 (N.J. 1994); and *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993).

facts, the framing of the question presented, or other collateral issues; and, it comes at a time when the dispute among the lower courts is mature and ripe for resolution. Finally, the case comes from a sharply divided lower court whose majority and dissenting opinions "vividly represented" the "two differing views on the meaning of *R.A.V.*" Br. in Opp. at 7. The case is worthy of review by this Court. *Certiorari* should be granted.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition for writ of certiorari should be granted.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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